(1) Supreme Court, U.S.
FILED
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No.____

IN THE
Supreme Court of the United States

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, AND HOWARD MCDOUGALL, ONE OF ITS TRUSTEES,
Petitioners,

v.

REIMER EXPRESS WORLD CORPORATION, A CANADIAN CORPORATION, AND REIMER EXPRESS ENTERPRISES LIMITED, A CANADIAN CORPORATION,
Respondents.

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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58 pp

QUESTIONS PRESENTED

1. Did the court below err in holding that the Due Process Clause of the Fifth Amendment of the United States Constitution requires that certain types of contacts between the defendant and the forum state (*e.g.*, ownership by the defendant of a subsidiary that operates in the forum state) be deemed *per se insufficient* "minimum contacts" with the forum for purposes of personal jurisdiction—regardless of whether those contacts between the defendant and the forum gave rise to the specific claim at issue in the case?

2. Where the federal statute applicable to a particular case bases liability upon the defendant's corporate affiliation (as in the case of "controlled group" liability under the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. 1381 *et seq.*), is it proper to ignore this statutory liability rule in determining whether a foreign parent corporation's affiliation with a United States-based subsidiary is a sufficient "minimum contact" with the U.S. for purposes of resolving the issue of personal jurisdiction under the specific jurisdiction doctrine?

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioner Central States, Southeast and Southwest Areas Pension Fund (the "Pension Fund") is a multiemployer employee benefit plan and trust and has no corporate affiliations. Petitioner Howard McDougal is one of the Trustees of the Pension Fund and has no corporate affiliations.

Respondents

Respondent Reimer Express World Corporation is a Canadian corporation, and Respondent Reimer Express Enterprises Limited is a Canadian corporation.

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OPINIONS BELOW

The November 17, 2000 order denying rehearing and rehearing *en banc* by the United States Court of Appeals of the Seventh Circuit is set forth in Appendix A hereto (App. A at 1a-2a).

The October 18, 2000 opinion for the United States Court of Appeals for the Seventh Circuit is reported at *Central States, Southeast and Southwest Areas Pension Fund v. Reimer Express World Corporation*, 230 F.3d 934 (7th Cir. 2000), and is set forth in Appendix B hereto (App. B at 3a).

BASIS FOR JURISDICTION

On October 18, 2000, the judgment of the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") was entered. On November 17, 2000, the Seventh Circuit denied a timely petition for rehearing with suggestion for rehearing en banc. This petition for writ of certiorari is filed within ninety days from that date. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Employment Retirement Income Security Act, § 4001(b)(1), 29 U.S.C. § 1301(b)(1):

> An individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of section 401(c)(1) of Title 26. For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of Title 26.

STATEMENT OF THE CASE

Petitioner (Plaintiff below) Central States, Southeast and Southwest Areas Pension Fund (the "Pension Fund" or "Central States") is a multiemployer employee benefit plan, within the meaning of § 3(37)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(37)(A). App. B at 4a. The Pension Fund is "among the largest Taft-Hartley trust funds in the United States . . . ." *Central States Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 562, 105 S.Ct. 2833, 2836 n. 1 (1985). Subject matter jurisdiction in the district court was premised upon 29 U.S.C. § 1132(e), 1451(d).

Respondent (Defendant below) Reimer Express Enterprises Limited ("REE") is a holding company with its principal place of business in Winnipeg, Manitoba, Canada. App. B at 4a. In January 1986, REE became the indirect owner (the corporate "great-grandparent") of Inter-City Truck Lines, Inc.

("ICTL"). *Id.* Respondent (Defendant below) Reimer Express World Corporation (AREWCOR") became a wholly owned subsidiary of REE in 1993. *Id.*

ICTL was, like its corporate parents, a Canadian corporation. However, ICTL conducted trucking operations in the United States out of Detroit, Michigan. App. B at 4a. At all relevant times, ICTL contributed to the Pension Fund on behalf of its employees pursuant to a collective bargaining agreement with Local Union 299 of the International Brotherhood of Teamsters in Detroit, Michigan. *Id.*

On November 13, 1991, REE's Manager of Human Resources, faxed a "Fringe Benefit Agreement" to the Pension Fund's offices in Rosemont, Illinois from REE's offices in Canada. App. B at 5a. The fax cover sheet indicated that this transmission was from an entity called "REE/ICTL." *Id.* This Agreement extended ICTL's obligation to contribute to the Pension Fund on the same terms provided by a national collective bargaining agreement. *Id.*

During 1992, the Pension Fund received communications from "Reimer Express Enterprises, Ltd." and "Reimer Express Lines." App. B at 5a. These communications also originated in Winnipeg and concerned ICTL's obligation to contribute to the Pension Fund on behalf of its employees. *Id.*

In May 1993, ICTL went out of business, and ceased contributing to the Pension Fund. This triggered pension withdrawal liability under the Multiemployer Pension Plan Amendment Act of 1980 ("MPPAA"), 29 U.S.C. § 1381 *et seq.* App. B at 5a. The Pension Fund assessed ICTL with withdrawal liability in the amount of $310,922.12. *Id.* at 6a. The Fund sued ICTL for this withdrawal liability and obtained a judgment, but that judgment proved to be uncollectible. *Id.*

Thereafter, the Pension Fund sued REE and REWCOR in the U.S. District Court for the Northern District of Illinois. App. B at 6a. The Pension Fund based its claims against Defendants REE and REWCOR upon the MPPAA "controlled group" rule (29 U.S.C. § 1301(b)(1)). This rule requires that all trades or businesses under "common control" with an employer that incurs a withdrawal from a multiemployer pension fund must pay the resulting withdrawal liability.

REE and REWCOR moved to dismiss the Pension Fund's claim on the grounds of lack of personal jurisdiction. The district court granted this motion. App. B at 7a.

On October 18, 2000, the Seventh Circuit affirmed the district court's decision. The Seventh Circuit noted that this Court has admonished "that 'mechanical' tests generally should not be relied upon in determining when personal jurisdiction is constitutional." App. B at 16a, *citing Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478, 105 S.Ct. 2174, (1985). However, the Seventh Circuit held that a defendant's "corporate affiliation [with a company that operates in the forum state] cannot serve as a basis for personal jurisdiction over" the defendant—even where a statute expressly declares that the defendant is subject to liability based upon this corporate affiliation. App. B at 19a. Thus the Seventh Circuit held that a corporate affiliation with a business that operates in the forum state would *always* be treated as failing to "meet constitutional minimums." App. B at 18a-19a. According to the Seventh Circuit, there is no need to examine the specific legal and factual background presented in the case if defendant's only contact with the forum comes through a corporate affiliation with another entity. The Seventh Circuit held that under those circumstances,

> [t]he laws on which the suit are based [are] *irrelevant* because a state or federal statute cannot transmogrify insufficient minimum contacts into a basis for personal

> jurisdiction by making these contacts elements of a cause of action, since this would violate due process.

App. B at 17a (emphasis added; citation omitted).

On November 17, 2000, the Seventh Circuit denied the Pension Fund's petition for rehearing. App. A at 1a-2a.

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE *DECISIONS OF THIS COURT AND THOSE OF OTHER CIRCUITS.*

A. The decisions of this Court and other circuits concerning specific jurisdiction do not permit defendant's contacts with forum to be analyzed in isolation from the specific legal claims in each case.

Under the statute at issue in this case, the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1381 *et seq.*, a corporate *affiliate* (*e.g.*, a parent corporation) of an employer that withdraws from a multiemployer pension plan is liable for the "withdrawal liability" incurred by the employer that actually contributed to the multiemployer plan on behalf of its employees. *See* 29 U.S.C. § 1301(b)(1) (all "trades or businesses" under "common control" are treated as a "single employer"); *see, e.g., Galgay v. Beaverbrook Coal Co.*, 105 F.3d 137, 142 (3rd Cir. 1997) (businesses that are in the "same controlled group" with the withdrawn employer are subject to withdrawal liability). In this case, the Seventh Circuit held that a foreign parent corporation which, six years after the passage of MPPAA, became affiliated with an employer contributing to the Pension Fund, and which knew of and actively facilitated the employer's participation in the Pension Fund, was not

subject to personal jurisdiction in the United States for a MPPAA claim.[1]

In so holding, the Seventh Circuit articulated a test for personal jurisdiction that conflicts with the prior decisions of this Court and with the personal jurisdiction analysis applied by other federal circuits. The Seventh Circuit's approach to personal jurisdiction represents a break from prior case law because the Seventh Circuit has held that certain contacts

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[1] This Court has taken up issues involving MPPAA, including the constitutionality of that statute under the Fifth Amendment Due Process Clause, on several occasions. *See, e.g., Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California, Inc.*, 522 U.S. 192, 118 S.Ct. 542 (1997); *Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414, 115 S.Ct. 981 (1995); *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 113 S.Ct. 2264 (1993); *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 106 S.Ct. 1018 (1986); *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 104 S.Ct. 2709 (1984).

The purpose of MPPAA is to require each employer participating in a multiemployer pension plan to be responsible for a proportionate share of the plan's "unfunded vested benefits." *See, e.g., Connolly*, 475 U.S. at 217. Unfunded vested benefits represent the shortfall between the present value of the pension fund's assets, as compared to the present value of the vested pension benefits the plan will be obligated to pay out in the future. *Id.*; 29 U.S.C. §§ 1381, 1391. However, employers only become obligated to pay withdrawal liability when they "withdraw" from the pension plan—that is, when they partially or completely cease making contributions to the plan on behalf of their employees. 29 U.S.C. §§ 1383, 1385.

Under the MPPAA "controlled group" liability rule, a parent corporation is jointly and severally liable for any withdrawal liability triggered by one of its subsidiaries. *See, e.g., Santa Fe Pacific Corp. v. Central States*, 22 F.3d 725 (7th Cir. 1994), *cert. denied*, 513 U.S. 987 (1984). Congress enacted the "control group" liability rule to "prevent businesses from shirking their ERISA obligations by fractionalizing operations into many separate entities." *Connors v. Ryan's Coal Co.*, 923 F.2d 1461, 1468 (11th Cir. 1991) (citation omitted).

between the defendant and forum state are intrinsically insufficient to support personal jurisdiction, no matter how closely linked to the litigation and the specific legal claims in a given case those contacts may be. As a result, the Seventh Circuit's decision has important implications, not only in cases involving MPPAA (and other statutes which predicate liability upon corporate affiliation), but in *all* cases in which personal jurisdiction is at issue.[2]

In *Helicopteros Nacionales le Columbia, S.A. v. Hall*, 466 U.S. 408, 414, 104 U.S.Ct. 1868, 1872 (1984), this Court reviewed the due process requirements applicable to issues of personal jurisdiction:

> Due process requirements are satisfied when in personam jurisdiction is asserted over a nonresident corporate defendant that has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945), *quoting Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 342, 85 L.Ed. 278 (1940). When a controversy is related to or "arises out of" a defendant's contacts with the forum, the Court has said that *a relationship among* the *defendant, the forum, and the litigation" is the essential foundation of in personam jurisdiction. Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 2579, 53 L.Ed. 683 (1977).

(emphasis added.) In *Helicopteros*, this Court also noted that "when a state exercises personal jurisdiction over a defendant

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[2] The Seventh Circuit correctly held that the "forum state" at issue in this case is the United States as a whole. App. B at 12a-13a. This is so because liability under a federal statute (ERISA) at issue, and the statute (29 U.S.C. §§ 1132(e), 1451(d)) provides for nationwide service of process. *Id.*

arising out of or related to the defendant's contacts with the forum, the state is exercising 'specific jurisdiction' over the defendant." *Helicopteros*, 466 U.S. at 415, n. 8 (citation omitted). On the other hand, "general jurisdiction" is proper when a defendant has "continuous and systematic contacts" with a state and it allows a defendant to be sued in that state regardless of the subject matter of the lawsuit. *Id.* at 408. *See also Consolidated Development Corporation v. Sherritt*, 216 F.3d 1286, 1291-92 (11th Cir. 2000) ("the nature and quality of [minimum] contacts . . . vary depending upon whether the type of personal jurisdiction being asserted is specific or general"; the due process minimum contact requirements of general jurisdiction are "more restrictive" than those of specific jurisdiction).

" '[M]inimum contacts' . . . for specific jurisdiction purposes is satisfied by actions, or even just a single act, by which the nonresident defendant 'purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.' " *Ruston Gas Turbines, Inc. v. Donaldson Company, Inc.*, 9 F.3d 415, 419 (5th Cir. 1993), *quoting Burger King Corp.*, 471 U.S. at 475. Moreover, "[t]he non-resident's 'purposeful availment' must be such that the defendant 'should *reasonably anticipate* being haled into court' in the forum state." *Id.*, *quoting World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567 (1980) (emphasis added).

In contrast, the Seventh Circuit's decision in this case holds that *regardless* of whether the conduct alleged against the defendant made it clearly foreseeable that defendant would be "haled into court" in the forum state, there are certain types of contacts with the forum which *per se* fail to qualify as constitutionally significant minimum contacts. The Seventh Circuit stated:

> To decide whether *specific personal jurisdiction* may be exercised, a court must engage in three distinct steps *in the following order*: (1) identify the contacts the defendant has with the forum; (2) analyze whether these contacts meet *constitutional minimums* and whether exercising jurisdiction on the basis of these minimum contacts sufficiently comports with fairness and justice; (3) determine whether the sufficient minimum contacts, if any, arise out of or are related to the causes of action involved in the suit. If the court determines at the second step that a defendant does not have sufficient minimum contacts with the forum, then its personal jurisdiction analysis ends without examining the plaintiff's causes of action. The laws on which the suit are based would be *irrelevant* because a state or federal statute cannot transmogrify insufficient minimum contacts into a basis for personal jurisdiction by making these contacts elements of a cause of action, since this would violate due process.

App. B at 17a (emphasis added; citation omitted).

Under this standard, the Seventh Circuit held that Respondents' conduct in purchasing and becoming affiliated with a corporation that operated in the United States could *never* form the basis of a minimum jurisdictional contact, regardless of the consequences of that corporate affiliation dictated by U.S. law and the specific claims at issue in the case. Yet it was undisputed that the "controlled group" relationship which the Respondents entered with ICTL (the subsidiary that participated in the Pension Fund) was the *proximate and clearly foreseeable cause* of the withdrawal liability asserted by the Pension Fund against Defendants. Therefore, Defendants "should *reasonably [have] anticipate[d]* being haled into court" in the United States, *World-Wide Volkswagen*, 444 U.S. at 297 (emphasis added), in the event their subsidiary incurred a withdrawal from the

Pension Fund. Further, in holding that a defendant's corporate affiliation should be disregarded *per se* as a "minimum contact," the Seventh Circuit ultimately utilized the sort of "mechanical" approach to personal jurisdiction which (as the Seventh Circuit acknowledged) this Court has cautioned should be avoided. App. B at 16a, citing *Burger King* 471 U.S. at 478, 105 S.Ct. 2175. Under the Seventh Circuit's analysis, certain contacts between the defendant and the forum must be peremptorily disregarded, without considering the relationship between those contacts and the specific legal and factual claims in the case. This holding by the Seventh Circuit conflicts with this Court's directive that where specific jurisdiction is invoked, "a *'relationship among the defendant, the forum, and the litigation' is the essential foundation of in personam jurisdiction.*" *Helicopteros*, 466 U.S. at 414, *quoting Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 2579 (1977) (emphasis added).

Consistent with this articulation of the specific jurisdiction doctrine by this Court, various federal circuits have noted that the nature and quality of the "minimum contacts" with the forum necessary to satisfy due process *vary* depending upon the specific substantive law and allegations at issue in a given case. *See, e.g., Francosteel Corp. v. M/V Charm*, 19 F.3d 624, 627 (11th Cir. 1994) ("The availability of specific jurisdiction depends on the relationship among the defendant, the forum and the litigation."); *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987) (a forum state "may . . . assert specific jurisdiction depending on the quality and nature of the defendant's contacts with the forum state *in relation to the cause of action*") (emphasis added); *Hertzberg & Noveck v. Spoon*, 681 F.2d 474, 479 (6th Cir. 1982) ("The minimum contacts test is a *flexible standard* which responds to different factual situations.") (emphasis added). However, in this case, the Seventh Circuit insisted that the "minimum contacts" test represents a monolithic and inflexible standard which cannot be varied in light of the statute or other substantive law at

issue in a specific case: "[A] federal statute cannot transmogrify, insufficient minimum contacts into a basis for personal jurisdiction by making these contacts elements of a cause of action . . . ." App. B at 17a. It is the very essence of the specific jurisdiction doctrine as established by this Court that what constitutes insufficient "minimum contacts" in one case may become constitutionally sufficient (become "transmogrified" in the phrasing of the Seventh Circuit) in another case because of differences in the legal claims and factual allegations.

As we have seen, under the decisions of this Court, the issue of the ability of the defendant to *foresee* a claim of the type asserted against him in the forum state is the hallmark of the specific jurisdiction doctrine. *See, e.g., World-Wide Volkswagen*, 414 U.S. at 292. Foreseeability can only be gauged by reference to the concrete facts and legal claims of each case. The substantive law on which the suit is based thus has a significant impact upon the foreseeability issue, and therefore upon the "minimum contacts" analysis. But the Seventh Circuit's analysis compels courts to exclude certain types of contacts with the forum as *per se* insufficient for purposes of personal jurisdiction, *regardless* of the degree to which the defendant's forum contacts made the specific claim at issue in the case foreseeable to the defendant.

This is contrary to the conventional formulation of the specific jurisdiction doctrine as advanced and articulated by this Court and generally followed in the circuits; that doctrine was intended to determine whether minimum jurisdictional contacts with the forum state have been satisfied *in light* of the specific circumstances and legal claims in each case. On the other hand, the Seventh Circuit's decision holds that courts should conduct a threshold analysis that disregards certain contacts with the forum, regardless of the specific circumstances of the case. Using this approach, the Seventh Circuit held that corporate affiliation with an entity that does

business in the forum state will always fail to qualify as a "minimum contact." It is unclear what other sorts of conduct would also, under the test posed by the Seventh Circuit in this case, be *per se* excluded as a minimum contact. The Seventh Circuit's decision has therefore articulated a new standard for personal jurisdiction which conflicts with the decisions of this Court and with other circuits, and has implications far beyond the theater of withdrawal liability litigation under MPPAA.

B. The prior decisions of this Court allow consideration of the ownership of property by the defendant as a sufficient "minimum contact."

The jurisdictional contact at issue in this case is Respondents" *ownership* of a corporation which, as Defendants knew, had extensive operations in the U.S. and participated in a multiemployer pension plan located in the U.S. In *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569 (1977), this Court held that a defendant's ownership of property that is located in, or has an impact upon, the forum state may be a sufficient "minimum contact" with the forum state for jurisdictional purposes, depending upon the specific legal claims and factual allegations in a given case: "[T]he presence of property in a state may bear upon the existence of jurisdiction by providing contacts among the forum State, the defendant and the litigation." 433 U.S. at 207. In *Shaffer*, the Court ultimately determined that the facts of that case did not present a sufficient relationship (for jurisdictional purposes) between the defendant's ownership of the property at issue, and the liability asserted against the defendant. *Id.* 433 U.S. at 213 ("the underlying cause of action [is not] related to the property").

However, the *Shaffer* opinion makes clear that a defendant's ownership of property that has an impact upon the forum state cannot simply be dismissed *per se* as an insufficient jurisdictional contact. The Court reiterated this

point in *Rush v. Sauchuk*, 444 U.S. 320, 328, 100 S.Ct. 571, 577 (1980):

> We held in Shaffer that the mere presence of property in a state does not establish a sufficient relationship between the owner of the property and the State to support the exercise of jurisdiction *over an unrelated cause of action. The ownership of property in the State is a contact between the defendant and the forum, and it may suggest the presence of other ties.*

(emphasis added.)

However, in this case the Seventh Circuit held that a defendant's ownership of property (*e.g.*, a subsidiary corporation) located in or affecting the forum state would *always* be an insufficient "minimum contact"—even in a case in which, pursuant to statute, the defendant's very act of ownership (*i.e.*, corporate affiliation) gave rise to the liability asserted against the defendant. This further demonstrates the Seventh Circuit's departure from the personal jurisdiction analysis formulated by this Court and followed in other circuits.

The Seventh Circuit's divergence from the accepted jurisdictional analysis resulted in part from its insistence that this case implicated the nostrum that "the activities of the subsidiary [cannot] be used as a basis for personal jurisdiction over the parent . . . ." App. B at 17a. However, Respondents' decision to enter and maintain a controlled group relationship with an entity that participated in the Pension Fund was Respondents' *own act*, not the act of their subsidiary corporation.

C. It is impossible to reconcile the Seventh Circuit's decision with the analysis of this Court and other circuits concerning the importance of "foreseeability" in personal jurisdiction issues.

The Respondents in this case (and in particular Respondent REE) had a clear opportunity to foresee that their affiliation with an employer that contributed to the Pension Fund would give rise to the withdrawal liability claim that was asserted in this case. Respondent REE entered into a corporate affiliation with ICTL in 1986—six years *after* the enactment of MPPAA and its rule of "controlled group" liability. App. B at 4a. Respondent REE clearly knew that ICTL operated in the United States and participated in the Pension Fund; indeed, REE's personnel department (located in Canada) repeatedly communicated with the Pension Fund's offices in Rosemont, Illinois concerning ICTL's participation in the Pension Fund. App. B at 4a-5a.

In the personal jurisdiction context, the mere ability of the defendant to foresee that his conduct would give rise to an injury in the forum state is usually not enough to establish minimum contacts. *World-Wide Volkswagen*, 444 U.S. at 297. "But the foreseeability that is critical to the due process analysis . . . . is that the defendant's conduct and connection with the forum state are such that he could reasonably anticipate being haled into court" in the forum state. *Id.*

Under this test for foreseeability, manufacturers who have introduced products into the stream of commerce, and have exhibited an intent to serve the market in the forum state (as, for example, by designing the product to suit the special needs of that market), are subject to suit in the forum state for injuries caused by their product. *See, e.g., Clune v. Alimak AB*, 233 F.3d 538, 542 (8th Cir. 2000) ("personal jurisdiction may be exercised consonant with due process 'over a corporation that delivers its products into the stream of

commerce with the expectation that they will be purchased by consumers in the forum State' "), *quoting World-Wide Volkswagen*, 444 U.S. at 297-98, 100 S.Ct. 559; *Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 243 (2nd Cir. 1999) (finding jurisdiction over a Japanese corporation that placed its defective product in the stream of commerce with the expectation that the product would be marketed in the forum state).

In these "stream of commerce cases," the forseeability of suit in the forum state is not as clear and well defined as in this case. In this case, Respondents' potential for incurring withdrawal liability to the Pension Fund was expressly spelled out by statute, and this liability *arose from* the statutorily-defined "controlled group" relationship with a U.S.-based corporation which Respondents elected to create and maintain. This clear foreseeability of withdrawal liability under the MPPAA "controlled group" rule was recently discussed in *Central States Pension Fund v. Creative Development*, 232 F.3d 406, 419 (5th Cir. 2000):

> If there are some who feel that *controlled group rules* produce unduly harsh results or set traps for the unwary, they should not turn a blind eye to all the facts that [defendants], as well as able counsel, knew or should have known .... They had to have known, for example, that [the subsidiary business] (1) employed union labor, (2) were parties to a [collective bargaining agreement], (3) were participating employers in a multiemployer plan pursuant to the [collective bargaining agreement], (4) were approaching imminent [insolvency or shut-down] and (5) would, by virtue of [insolvency or shutdown] cease to participate in that multiemployer plan, leaving a substantial deficit in funding and thus withdrawal liability.

(emphasis added.) Each of these "known or should have known" factors relating to the consequences of entering a

"controlled group" relationship as enumerated in *Creative Development* is equally applicable to the Respondents in this case.

Moreover, Respondents' liability in this case did not come from a faceless mass of consumers who may have come into contact with Respondents" product—as in the "stream of commerce" case. Pursuant to statute, Respondents clearly and specifically owed withdrawal liability *to the Pension Fund* in the event Respondents' subsidiary incurred a withdrawal from the Fund.

The Seventh Circuit was correct in noting that the commencement and maintenance of a parent-subsidiary relationship does not " '*automatically* establish jurisdiction.'" App. B at 16a, *quoting Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13, 104 S.Ct. 1473 (1984) (emphasis added). However, when the specific circumstances and legal context of *this* case are added to the mix, the corporate affiliation is sufficient. As noted, these specific circumstances add the vital element of foreseeability; Respondents' relationship with the ICTL had a clear and distinct impact under the U.S. scheme of pension regulation. Therefore, in this case, the Pension Fund has not attempted to use the "unilateral activity" of ICTL (the subsidiary corporation) as a basis for jurisdiction over ICTL's parent corporations—as the Seventh Circuit's decision suggests. App. B at 17a. Again, at issue here are the parent corporations' *own activities* in forming and maintaining a parent-subsidiary bond with a subsidiary which they knew operated in the U.S. and participated in the Pension Fund. Further, although in general "a company's owners reasonably expect that they cannot be held liable for the faults of the company" (App. B at 17a), the passage of MPPAA in 1980 altered what these Defendants could "reasonably expect." "If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be

ossified forever." Lon Fuller, *The Morality of Law*, 60 (1964).[3]

Therefore, the Seventh Circuit's decision in this case is at odds with the foreseeability analysis articulated in the personal jurisdiction decisions of this Court and other circuits.

D. The Seventh Circuit's analysis disregards forum contacts that (1) gave rise to the claim at issue and (2) are substantively relevant to the cause of action.

It is important to note that Respondents' forum contacts are not merely "related to" the cause of action at issue in this case. Rather, Respondents' forum contacts—*i.e.*, their control group relationship with a corporate subsidiary operating in the U.S. and participating in the Pension Fund—

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[3] The Seventh Circuit's decision is *not*, as that court suggested, supported by *AT&T Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 590-91 (9th Cir. 1996). App. B at 18a. That case only held that in the context of CERCLA liability, the jurisdictional contacts of a subsidiary would not automatically be attributed to the parent corporation. As the Seventh Circuit noted, and as the *AT&T* opinion anticipated (*see* 94 F. 3d at 590 n.8), the law is now clear that CERCLA liability cannot be imposed on a parent corporation because of the conduct of a polluting subsidiary *unless* the corporate veil can be pierced. App. B at 18a-19a, *citing United States v. Bestfoods*, 524 U.S. 51, 61-62, 118 S.Ct. 76 (1998). Under this controlling legal standard, the court in *AT&T* correctly concluded that it could not establish liability over the parent. This is so because the court in *AT&T* also concluded that there was no basis to pierce the corporate veil. 94 F.3d at 591. However, MPPAA creates a wholly separate liability standard and does *not* require a showing that the corporate veil should be pierced before the parent can be held jointly and severally liable for the withdrawal of the subsidiary. Since 1980, MPPAA has broadcast to parent corporations that by becoming a part of (or remaining in) the chain of ownership with companies that contribute to a multiemployer pension plan the parent corporations are exposing themselves to withdrawal liability.

actually *gave rise* to the cause of action asserted against them. That is, Respondents' controlled group relationship with the withdrawn employer is a vital element of the very cause of action asserted against them in this case. Further, given the clear foreseeability of the withdrawal liability claim that resulted from Respondents' controlled group relationship with a company that participated in the Pension Fund, that relationship must fairly be said to be a *proximate cause* of the liability asserted in this case.

Several of the federal circuits do not go so far as to *require* a showing of proximate causation between the defendant's forum contacts and the liability asserted in the case in order to establish personal jurisdiction; these circuits apply a less stringent test of "but for" causation. *See, e.g., Nowak v. Tak How Investments, Ltd*, 94 F.3d 708, 715 (1st Cir.), *cert. denied*, 520 U.S. 1155 (1997) ("[A] proximate cause standard is likely to enable defendants to better anticipate which conduct might subject them to a state's jurisdiction than a more tenuous link in the chain of causation," *however*, "strict adherence to a proximate cause standard in all cases is unnecessarily restrictive"); *Ballad v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995) (We rely on a '*but for*' test to determine whether a particular claim arises out of forum-related activities . . . .") (emphasis added); *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1270 n. 21 (5th Cir. 1981) ("a forum contact [that] is a 'but for' causative factor for the tort" at issue in a case can form the basis of personal jurisdiction). Other circuits appear to insist upon the more strict "proximate cause" standard. *See, e.g., United Electrical, Radio and Machine Workers of America v. 163 Pleasant Street*, 960 F.2d 1080, 1089 (1st Cir. 1992); *Pearrow v. National Life & Accident Ins. Co.*, 703 F.2d 1067, 1069 (8th Cir. 1983).

But the Seventh Circuit's decision in this case is at odds with both the circuits posing a "but for" cause test *and* with "proximate cause" circuits. No matter how the test for

determining whether the defendant's forum contacts have "given rise" to the claim is formulated for purposes of deciding specific jurisdiction cases, it must be concluded that Respondents' forum contacts meaningfully gave rise to the withdrawal liability claim at issue in this case. This is so because Respondents' controlled group relationship with the withdrawn MPPAA employer is a "but for" cause *and* a proximate cause of the withdrawal liability asserted against them. This contact and relationship with the forum is also "substantively relevant" to the cause of action asserted in this case. *See* Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 Sup.Ct.Rev. 77, 82-83, 85-86 (arguing that the only forum contacts meriting consideration in specific jurisdiction analysis are *those material in proving liability under the substantive law at issue in the case.*) [4]

The Seventh Circuit stated that personal jurisdiction should not be "confuse[d]" with liability. App. B at 17a. This statement is true as far as it goes, but the Seventh Circuit ignored the need to examine the *relationship* between defendant's forum contacts and the substantive allegations in the case. The Seventh Circuit also stated:

> In many circumstances, the conduct of a foreign defendant may *satisfy the elements of liability contained in a statute*, but this defendant will escape liability because personal jurisdiction is lacking.

App. B at 18a (emphasis added). But in this case it was not just that a foreign defendant's conduct "satisfied the elements of liability contained in a statute." The key issue for personal

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[4] At least one commentator has criticized the "substantive relevance" standard as imposing a restriction on forum states' jurisdiction that is not necessary under the Due Process Clause. Mary Twitchell, *The Myth of General Jurisdiction*, 101 Harv.L.Rev. 610, 653-54 (1988). But even under this restrictive standard, personal jurisdiction was established in this case.

jurisdiction—and the issue left out completely under the standard articulated by the Seventh Circuit—is whether defendant's conduct *impacting the forum state* in itself satisfied one of the elements of the cause of action. Consequently, the Seventh Circuit endorsed a test for determining personal jurisdiction that denigrates the essential relationship among the defendant, the forum and the substantive claims in the litigation.

E. The Seventh Circuit's decision is at odds with the decisions of this Court and the other circuits concerning the need to examine the "reasonableness" of the exercise of jurisdiction.

Once "purposeful availment" [*i.e.*, minimum contacts with the forum state] has been established, the forum's exercise of jurisdiction is presumptively reasonable. *Burger King*, 471 U.S. at 476. In order to rebut that presumption, a defendant must present a compelling case that the exercise of jurisdiction would in fact be unreasonable. *Id.* For the reasons stated above, in this case, the Pension Fund satisfied the "purposeful availment" (or minimum contacts) requirement. Therefore, the burden should have shifted to the Respondents to show that the exercise of jurisdiction by the courts of the United States would have been unreasonable. Moreover:

> [T]he reasonableness prong of the due process inquiry evokes a sliding scale: the weaker the plaintiff's showing on [minimum contacts], the less a defendant need show in terms of unreasonableness to defeat jurisdiction. The reverse is equally true: *an especially strong showing of reasonableness may serve to fortify a borderline showing of minimum* contacts.

Ticketmaster—New York, Inc. v. Alioto, 26 F.3d 201, 210 (1st Cir. 1994); *accord Burger King*, 471 U.S. at 477 (emphasis added).

In evaluating whether the exercise of jurisdiction is reasonable, a court should consider, (1) the burden of defendant of litigating in the forum, (2) the interest of the forum in this case, (3) the interest of the plaintiff in obtaining relief, (4) judicial economy and (5) the shared interest of the several states in the fundamental substantive policies at issue. *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 113, 107 S.Ct. 1026 (1987).

The Seventh Circuit's failure to consider these "reasonableness" factors further demonstrates that court's departure from conventional jurisdictional analysis. The United States has a strong interest in assuring that *foreign* members of withdrawal liability controlled groups are held responsible for the portion of this liability dictated by MPPAA. Any other result would shift the burden of pension funding unduly to domestic employers and their corporate affiliates. *See* Pension Benefit Guaranty Corporation Opinion Letter ("PBGC Op. Ltr.") 97-1 (agency responsible for interpreting MPPAA opines that foreign controlled group member is subject to MPPAA; the "purpose [of MPPAA] would be ill-served by a controlled group principle that did not apply to all entities under common control"). Ultimately, those dependent upon multiemployer plans for their pensions are placed at risk when members of a withdrawal liability "controlled group" are permitted to escape the share of responsibility for pension funding allocated to them under MPPAA.[5]

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[5] The Respondents also moved to dismiss below on the asserted ground that the Pension Fund was attempting to give MPPAA an improper "extraterritorial" reach. Because the Seventh Circuit found no personal jurisdiction, it did not decide the issue of extraterritoriality. However, it was undisputed that the withdrawal from the Pension Fund occurred in the

It should also be recalled that the MPPAA controlled group rule applies to parent corporations even if they are *not* aware that their subsidiaries have participated in a multiemployer pension plan. *See, e.g., Central States Pension Fund v. Slotky*, 956 F.2d 1369, 1375 (7th Cir. 1992) (controlled group rule does not violate due process requirements, even where parent or owner of corporation which participated in a pension plan only received indirect notice (*i.e.*, notice to subsidiary corporation but not actual notice to owner or parent) of withdrawal liability assessment). It is manifestly against the interest of the United States to blunt the operation of this rule simply because the parent corporation happens to be located across the U.S. border in Canada. But it is particularly inappropriate to give a "free pass" to a foreign corporations such as Respondents which had *actual notice* of their subsidiary's participation in a multiemployer pension plan located in the U.S., and indeed facilitated and managed the subsidiary's relationship with the pension plan. App. B at 4a-5a. The personal jurisdiction analysis employed by the Seventh Circuit gives an undeserved competitive advantage to foreign corporations over businesses that are resident in this country.

Withdrawal liability is a unique creature of statute under the pension laws of the United States. Therefore, this is not a

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United States, and the Pension Fund's statutorily defined loss or injury was felt there. Although there is a presumption that Congress does not intend to give federal statutes an extraterritorial effect, "the presumption is generally not applied where the failure to extend the scope fo the statute will result *in adverse effects within the United States.*" *Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C.Cir. 1993) (emphasis added). *See also Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 665 (7th Cir.), *cert. denied*, 525 U.S. 1114 (1999) (in analyzing extraterritoriality "courts seek to determine whether actions 'occurring in foreign countries ha[ve] caused *foreseeable and substantial* harm to interests in the United States' ") (emphasis added; citations omitted). Therefore, this case does not involve an extraterritorial application of a federal statute. *Accord* PGBC Op. Ltr. 97-1.

case in which the Plaintiff Pension Fund can go to a foreign forum to seek redress—as is, of course, frequently the case in personal injury and other tort cases. This highlights the strong interest of the United States and of the Pension Fund in allowing the courts of this country to exercise jurisdiction over the Respondents in this case.

On the other hand, the Respondents made no showing that requiring them to respond to the withdrawal liability action would create an undue burden for them. Nor was there any indication in this case that the substantive policies of the nation of Canada would be offended by a finding of U.S. jurisdiction over the Respondents in this case.

Therefore, the Seventh Circuit's failure to conduct an inquiry into the reasonableness of the exercise of jurisdiction in this case is in conflict with the decisions of this Court and the other circuits.

II. THIS CASE PRESENTS ISSUES OF PUBLIC IMPORTANCE.

The Seventh Circuit's decision in this case was not merely wrong; it articulates a new legal standard applicable to personal jurisdiction issues under the Due Process Clause of the Fifth Amendment of the Constitution of the United States. As we have seen, under the Seventh Circuit's standard, certain contacts between the defendant and the forum state are to be disregarded as *per se* insufficient to support personal jurisdiction, no matter how tightly bound those forum contacts may be to the specific factual allegations and legal claims in a particular case. This standard contradicts a wealth of decisions by this Court and other circuits holding that the sufficiency of a forum contact must *always* be tested in light of the relationship the contact has with the substantive claims in the case.

The contact at issue in this case is essentially Respondents' *ownership* of an entity that was located in or impacted the

forum state. Therefore, the Seventh Circuit's decision calls in question any effort to exercise jurisdiction based on a defendant's ownership of property in the forum—even where the property itself, or indeed the ownership relationship itself—gives rise to the cause of action at issue in the case. Under the Seventh Circuit's analysis in this case, other types of "indirect" relationships with a forum which heretofore would have been at least *candidates* for consideration as "minimum contacts" (subject to a determination as to whether the relationship with the forum gave rise to the specific cause of action at issue) will now likely be excluded as *per se* insufficient to support personal jurisdiction.

Moreover, even if the logical reach of the Seventh Circuit's decision in this case could be limited to situations involving statutes imposing liability upon the basis of corporate affiliation, it should be noted that MPPAA is not the only statute containing this type of liability rule. *See, e.g., Branch v. U.S.*, 69 F.3d 1571, 1579 (Fed.Cir.), *cert. denied*, 519 U.S. 810 (1996) (Financial Institutions Reform, Recovery and Enforcement Act commands that *sister* banks owned by the same bank holding company as a bank that causes a loss to the Federal Bank Insurance Fund are also liable for the loss; this statute does not violate the Fifth Amendment Takings Clause); *Donohoe v. Consolidated Operating & Production Corp.*, 982 F.2d 1130, 1138 (7th Cir. 1992) (majority owners of a corporation that issued shares that are the subject of an action under the Securities Exchange Act of 1934 may be liable as "controlling persons" of that corporation). The Seventh Circuit's decision in this case represents a judicial encroachment upon these statutes not warranted by the Fifth Amendment Due Process Clause. This in itself is an issue of public importance which warrants review by this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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February 13, 2001

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

November 17, 2000

Hon. JOEL M. FLAUM, Chief Judge

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

No. 00-1502

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, AND HOWARD MCDOUGALL, TRUSTEE,
Plaintiffs-Appellants,

v.

REIMER EXPRESS WORLD CORPORATION, A CANADIAN CORPORATION, AND REIMER EXPRESS ENTERPRISES LIMITED, A CANADIAN CORPORATION.
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

No. 99 C2524
James B Moran
Judge.

ORDER

On consideration of the petition for rehearing and petition for rehearing en banc filed in the above-entitled case on November 1, 2000, by plaintiff-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be and the same is hereby DENIED.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-1502

CENTRAL. STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and HOWARD MCDOUGALL TRUSTEE,
Plaintiffs-Appellants,

v.

REIMER EXPRESS WORLD CORPORATION, A CANADIAN CORPORATION, and REIMER EXPRESS ENTERPRISES LIMITED, A CANADIAN CORPORATION,
Defendants-Appellees.

Appeal from the united States District court
for the Northern District of Illinois, Eastern Division.
No. 99 C 2524—James B. Moran, Judge.

Argued September 13 , 2000—Decided October 18 , 2000

Before FLAUM, *Chief Judge*, and BAUER and KANHE, *Circuit Judges*.

Flaum chief judge. Central States, southeast and southwest Areas Pension Fund, and its trustee Howard McDougall (collectively, the "fund") appeal the dismissal of their suit and the denial of their motion to conduct discovery against Reimer express Enterprises, Limited ("REE"), and Reimer Express world corporation ("REWCOR"). The Fund challenges the district court's determinations that personal jurisdiction over the defendants two Canadian companies,

was lacking and that discovery on this issue was unnecessary. For the reasons stated herein, we affirm.

I. Background

REE is a Canadian holding company corporation with its principal place of business in Winnipeg, Manitoba, Canada. In January 1986, REE owned all the stock of a Canadian corporation named 141622 Canada, Inc., when this corporation purchased all the common stock of another Canadian company, 140593 Canada, Inc. The record does not reveal where this acquisition took place, but the district court concluded that the transaction occurred in Canada. 140593 Canada, Inc. owned all the stock of inter-city truck Lines, Inc. ("ICTL")., Thus, from January 1986 until February 1994 when REE sold 141622 Canada Inc., REE was the corporate "great-grandparent" of ITCL. REWCOR, which was formed as a Canadian corporation on November 29, 1993, is a wholly owned subsidiary of REE.

ICTL was Canadian corporation with its principal place of business in Canada that also operated a United States trucking enterprise out of Detroit, Michigan. ICTL engaged in extensive business in the United States and participated in the Fund. under collective bargaining agreements between ICTL and Local 299 of the international Brotherhood of Teamsters, ICTL was obligated to contribute to the Fund on behalf of ICTL's employees. The Fund is a multiemployer pension plan within the meaning of the Employee Retirement income Security Act ("ERISA"), 29 U.S.C. sec. sec. 1002(37), 1301(a)(3), and is administered from Rosemont, Illinois.

ICTL contributed to the Fund under a collective bargaining agreement covering April 1, 1988 through March 31 1991. From the beginning of this period until March 1990, the Fund sent bills to ICTL'S address in Detroit. In March 1990, ICTL requested that its billing address be changed to a street address in Winnipeg, Manitoba, which was not the address of

the registered office of REE. In January 1991 ICTL asked that the Fund change its address to a post office box, which also was located in Winnipeg.

On November 13, 1991, the Fund received via fax a document titled "Fringe Benefit Agreement" whose cover page was on REE's letterhead. This agreement extended ICTL's obligation to contribute to the Fund on the terms provided by a national collective bargaining agreement. It was signed by J.D. Cockburn, whose title was described on the document as Manager of Human Resources and Industrial Relations of REE and whose address was that of REE. The fax legend named the sender of the document as "REE/ICTL."

In November 1992, the Fund received a fax from Linda, Messel, whose position was listed as "ICTL (Payroll)." The letterhead of the fax cover page read "Reimer express Enterprises Ltd., Administration Centre, Winnipeg." The attachments to this fax related to ICTL's obligation to remit contributions to the Fund. Prior to this fax, the Fund had received a fax from the same person with a cover page reading "Reimer Express Lines," which was a subsidiary of REE at the time.

In May 1993, ICTL went out of business and ceased to have an obligation to contribute to the Fund. This constituted a withdrawal under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") to ERISA. 29 U.S.C. Sec. 1383. Under MPPAA an employer that withdraws from a pension plan Incurs withdrawal liability. 29 U.S.C. sec. 1381. Businesses under common control are jointly and severally liable for the withdrawal liability of any affiliate.[1] 29 U.SC. sec. 1301(b)(1).

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[1] A fuller account of withdrawal liability under ERISA and the MPPDA can be found in *Central States, Southeast and Southwest Areas*

The Fund assessed ICTL's withdrawal liability to be $310,922.12. The Fund prevailed in a suit against ICTL for this amount plus interest, but this judgment has not been satisfied. After determining that REE and REWCOR were affiliated with ICTL, on June 23, 1994, the Fund sent a notice demanding payment of ICTL's withdrawal liability plus interest. The defendants asked for a review of the Fund's determination which was denied by the Fund on November 1, 1994. The Canadian companies have refused to pay the withdrawal liability.

The Fund filed the current action in federal district court in Illinois and served process on REE and REWCOR in Canada The defendants filed a motion seeking to dismiss under Federal Rules of Civil Procedure 12 (b) (1), 12 (b) (2), and 12 (b) (6). As part of that motion, the defendants submitted the affidavit of WA. Redekopp, the general counsel of REWCOR. Redekopp said that REE, REWCOR and its subsidiaries such as ICTL have observed all corporate formalities, and that neither defendant exercised day-to-day management control of ICTL, 141622 Canada, Inc, or 140593 Canada, Inc. Redekopp also stated that REE or REWCOR have not done any business, have not had an office or telephone number, or owned or leased any property in Illinois or anywhere in the United states.

Accompanying the defendants' reply brief was an affidavit from James D. Cockburn and a second affidavit from Redekopp. Cockburn stated that in 1991 he was employed by REE and served as a consultant to REE's operating subsidiaries on labor matters. REE charged its subsidiaries a fee for the use of Cockburn's services. Cockburn further averred that prior to executing the aforementioned fringe benefit agreement, he discussed the matter with Hugh

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Pension Fund v. Midwest Motor Express, Inc., 181 F. 3d 799, 803-04 (7th Cir. 1999).

Richardson, then president of ICTL, who orally authorized Cockburn to sign the document on behalf of ICTL. Thus, Cockburn claims that he was serving as an agent of ITCL and not REE when he signed the agreement. Redekopp stated that REE provided administrative services to its subsidiaries in return for fees. Redekopp explained that Messel was employed by REE and, at the request and direction of ITCL management, provided payroll services to ICTL, which was charged by REE for these services. He also claimed that none of these REE employees were involved in the day-to-day management of the subsidiaries.

The trial Judge granted the defendants' motion to dismiss because personal jurisdiction was absent, ruling on the other grounds for dismissal.[2] The court stated that corporate ownership generally is not a sufficient basis for personal jurisdiction. Likewise, the provision of administrative services by a parent for a subsidiary does not trigger personal jurisdiction over the parent. The Fund had not alleged that REE and REWCOR were the alter egos of ICTL, controlled ICTL to the degree necessary to pierce the corporate veil, or exerted substantial control over ICTL's day-to-day activities. The court also denied the Fund's request for discovery, finding that the activities plaintiffs wished to Investigate were attributable only to ICTL and were not related to the ERISA cause of action. The Fund timely appealed.

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[2] Though subject-matter jurisdiction generally should be considered before personal jurisdiction, a district court may dismiss for lack of personal jurisdiction without determining whether subject-matter jurisdiction exists. See *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578, 587-88 (1999). Since we have the benefit of the lower court's reasoning regarding personal jurisdiction but not subject-matter jurisdiction, we follow its lead and discuss personal jurisdiction first.

III. Discussion

A. Personal jurisdiction

The Fund argues that the district court had specific personal jurisdiction [3] over the defendants based on their Contacts either with Illinois or with the United States as a whole. It claims that the standard rule that corporate ownership cannot confer jurisdiction over the parent does not apply in the context of a statutory scheme that praises liability on such affiliation. The Fund also asserts that REE and REWCOR had enough other contacts with either Illinois or the United States to be subject to jurisdiction by the district court.

Dismissals for lack of personal jurisdiction are reviewed *de novo*. *See Logan Productions, Inc v. Optibase, Inc.* 103 F.3d 49, 52 (7th Cir. 1996). The plaintiff bears the burden of demonstrating personal jurisdiction. See *RAR Inc v. Turner Diesel, Ltd*, 107 F.3d 1272 1276 (7th Cir. 1997). We first determine whether there are federal or state statutory grounds for personal jurisdiction, then see whether the state constitution bars such jurisdiction if it is based on a state statute, and finally determine if the exercise of jurisdiction over the defendant would be consistent with the federal constitution.

1. Statutory basis.

The Fund served process on REE and a REWCOR in Canada. Service is sufficient to establish personal jurisdiction if the defendant could be subject to jurisdiction in courts of the state where the district court Is located. Fed.R.Civ.P. 4(k) (1) (A). If no state could exercise jurisdiction then service

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[3] The Fund concedes that Its evidence is insufficient to show the systematic and continuous contacts necessary to subject the defendants to general personal jurisdiction. *See* generally *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-15 & n.9 (1984).

will establish personal jurisdiction for claims arising under federal law if the exercise of jurisdiction is consistent with the constitution and laws of the united States. Fed. R. Civ. P. 4(k)(2). The Fund argues that the district court has personal jurisdiction over REE and REWCOR under either the Illinois long-arm statute or, if Illinois cannot assert jurisdiction, Federal Rule of civil Procedure 4(k)(2) since the MPPAA is a federal statute and no other state could exercise jurisdiction.

a) Illinois long-arm.

The Illinois long-arm statute permits its courts to exercise jurisdiction on any basis permitted by the Illinois and United States Constitutions. 735 Ill. Comp. Stat. 5/2-209(c). Thus we next turn to the Illinois constitution. The Illinois constitution's guarantee of due process are not necessarily the same as those provided by the federal constitution *see Rollins v. Ellwood*, 565 N.E.2d 1302. 1316 (1990) but Illinois case law does not elucidate any differences regarding the instant personal jurisdiction question. *See* RAR 107 F.3d at 1276. Illinois courts exercise jurisdiction over parents based on the activities of the subsidiary where the corporate veil can be pierced, or perhaps where all the corporate formalities are observed but the subsidiary's only purpose is to conduct the business of the parent. See *IDS Life Ins. co. v. SunAmerica Life Ins. co.*, 136 F3d 537, 541 (7th Cir. 1998). However, whether corporate ownership alone or coupled with some administrative activities by the parent on behalf of the subsidiary is sufficient for Jurisdiction under the Illinois constitution is unclear. *See id.* In any case the defendants do not argue that state constitutional law prohibits the exercise of jurisdiction and so we assume arguendo that personal jurisdiction here would not violate the Illinois constitution. *See* RAR, 107 F3d at 1277 (finding Illinois constitutional law unclear on the question of personal jurisdiction and so moving to next step of analyzing federal constitutional law). Thus, neither the state statute nor constitution prohibits

personal jurisdiction, and so we must determine whether jurisdiction comports with the federal constitution.

b) Federal Rule of Civil Procedure 4(k) (2).

The Fund argues that if Illinois courts cannot exercise personal jurisdiction over REE and REWCOR, then jurisdiction is proper under Rule 4(k)(2) because it served process on the defendants. Four conditions must be present for Rule 4(k)(2) to apply: (1) the plaintiff's claims must be based on federal law; (2) no state court could exercise jurisdiction over the defendants; (3) the exercise of jurisdiction must be consistent with the laws of the United States; and (4) the exercise of jurisdiction must be consistent with the Constitution. The fund is suing under MPPAA so the first condition is met. The defendants do not argue that jurisdiction is proper in some state besides Illinois, so we may assume that if jurisdiction is not proper in Illinois that it is not proper in any state. Whether personal jurisdiction in these circumstances would be constitutional is addressed below; in this subsection we address whether such jurisdiction would be consistent with the laws of the United States.

REE and REWCOR claim that the exercise of jurisdiction would be inconsistent with ERISA and MPPAA's service of process sections,[4] and buttress their argument with a citation to *United Elec., Radio and Mach. workers of American v. 163 Pleasant St. corp.*, 960 F.2d 1080, 1086 (1st air. 1992). We have previously held that the RICO statute, whose service of process provision, 18 U.S.C. sec. 1965(d) [5] is similar to those

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[4] These two provisions are 29 U.S.C. sec. 1132(e)(2) ("P]rocess may be served in any other district where a defendant resides or may be found."), which is the general provision, and 29 U.S.C. sec. 1451(d) ("[P]rocess may be served in any district where a defendant resides, does business, or may be found."), which applies only to actions Involving multiemployer plans such as the Fund.

[5] "All other process . . . may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affair."

of ERISA, does not authorize worldwide service of process. See *Stauffacher v. Bennett*, 969 F.2d 455, 460-61 (7th Cir. 1992). However, both of these cases were decided under old Fed. R.Civ.P. 4(f) (repealed 1993) which stated that all process (besides a subpoena) could be served beyond the territorial limits of the state in which the districts courts sits "when authorized by a statute of the United States or by these rules" (emphasis added).[6] The word "authorized" indicates that some affirmative expression from Congress through a statute was necessary before process could be served extraterritorially. *See* generally *Omni Capital Int'l Ltd. v. Rudolf Wolff & co.*, 484 U.S. 97, 108-111 (1987). The RICO and ERISA service of process provisions state that service may be made in "any district," which indicates that Congress authorized service only in the judicial districts of the United States and not worldwide. In comparison, Congress authorized worldwide service in laws stating that service could be made "wherever the defendant may be found," or similar language, which is not limited to the judicial districts of the United States. *See Robinson Eng'g Co. Pension Plan and Trust v. George* 223 F.3d 445, 449 (7th Cir. 2000).

We find that Rule 4(k)(2), which was enacted after united workers and Stauffacher, permits jurisdiction to be exercised by the service of process even if a statute does not specifically state that service is proper as long as the Rule's conditions are satisfied and no other statute prohibits jurisdiction or indicates that jurisdiction would be improper. Three reasons support this conclusion, two based on principles of statutory interpretation and the third grounded in the purposes of Congress in enacting Rule 4(k)(2).

First, Rule 4(k)(2) provides that for claims arising under federal law where no state could exercise jurisdiction, service

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[6] As explained hereafter, the substance of this old Rule 4(f) has been recodified In current mile 4 (k)(1)(D)

of process is sufficient to establish personal jurisdiction if "consistent with the constitution and laws of the United States." (emphasis added). Different words in a statutes in this case "authorized" and "consistent," "should be given different meanings unless the context indicates otherwise. *See*, e.g., *Bailey v. United States*, 516 U.S. 137, 143 (1995). Similarly, we give statutory words their ordinary meaning absent some indication that Congress intended these to have a different import. *See, e.g., Williams v, Taylor__U.S.__*, 120 S. Ct. 1479, 1488 (2000). Unlike "authorized," whose meaning is described above, use of the word "consistent" in Fed. R, Civ. P. 4(k) (2) does not require that a statute explicitly permit worldwide service of process for service to be proper. A law of the United States and the act of exercising jurisdiction are consistent unless exercising jurisdiction contradicts, conflicts with, or is in opposition to a law. Thus, if a statutory provision permits nationwide service but is silent with respect to worldwide service, then worldwide service is "consistent" with this statute, since such service does not contradict or oppose the statutory language. Rule 4(k)(2), if its other requirements are met, more or less reverses the presumption of old Rule 4(f). Under the old rule, service could not be made internationally unless expressly permitted by federal statute; under the new rule, again when its other requirements are satisfied, service may be made internationally unless doing so would contradict or be in tension with another federal statute.

Second, current Rule 4(k)(1)(D) states that service of process is sufficient to establish personal jurisdiction "when authorized by a statute of the United States." Rule 4(k)(1)(D) provides for jurisdiction whenever a statute explicitly authorizes service of process. If establishing personal jurisdiction by serving process was considered inconsistent with a law which is silent on the issue, then Rule 4(k)(2) would not have any effect. Under the defendants' argument, whenever a statute explicitly permits jurisdiction, Rule

4(k)(1)(D) would apply; if the statute did not explicitly permit jurisdiction Rule 4(k) (2) could not apply. Rule 4(k)(2) would be meaningless, contradicting the interpretive principle that every word or provision of a statute must, if possible, be given some effect. See, e.g., *Public Lands Council v. Babbitt*, U.S., 120 S. Ct. 1815 1826 (2000). Thus, jurisdiction can be exercised under Rule 4(k) (2) even where not explicitly provided for in another federal statute.[7]

Third, Rule 4(k) (2) was intended as a response to the Supreme Court's decision in Omni Capital, 484 U.S. 97. Fed. R.Civ. P. 4 advisory committee's note. Omni capital, which was decided under old Fed. R. Civ.P. 4(f), involved a plaintiff who served process on a foreign defendant in an attempt to initiate an action under the Commodities Exchange Act ("CEA") which was silent on the question of international service The Supreme court held that courts could not create their own rules for service of process, and thus the plaintiff's service was improper and the district court lacked personal jurisdiction over the defendants. 484 U.S. at 108-09. However, the Court suggested that "[a] narrowly tailored service of process provision, authorizing service on an alien in a federal-question case when the alien is not amenable to service under the applicable state long-am statute, might well serve the ends of the CEA and other federal statues." *Id.* at 111. Rule 4(k)(2) responds to this suggestion and is meant to

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[7] Note that this interpretation of Rule 4(k) (2) does not render Rule 4(k)(2) superfluous. Rule 4(k) (1) (D) has an independent effect whenever a federal statute authorizes service of process but a state could exercise Jurisdiction. For example, under ERISA, if process is properly served on defendants within the United States, those defendants can be required to litigate in the district where the plan is administered, even if they have no contacts with that state. See *Board of Trustees, Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031, 1037 (7th Cir. 2000). In such cases, Rule 4(k)(1)(D) provides the statutory basis for jurisdiction because the defendants would be subject to the jurisdiction of the state in which they are Found, and so Rule 4 (k)(2) would not apply.

permit international service of process where statutes are silent, like the CEA at the time of Omni Capital. This history of Rule 4(k)(2) further supports the interpretation that it provides a statutory basis for personal jurisdiction through service of process *unless* this contradicts or conflicts with another federal law.

Rule 4(k)(2) may be applicable to our case. Permitting personal Jurisdiction through international service does not conflict with and is not in tension with the *ERISA* service of process provisions or any other federal statute that has been brought to our attention. Thus, three of the requirements for the use of Rule 4(k) (2) , all except the constitutional issue are satisfied if no state long-arm statute can be used. If Illinois cannot exercise jurisdiction over REE and REWCOR, Rule 4(k) (2) may provide a statutory basis for personal jurisdiction if there is no constitutional barrier.

2. Constitutional basis.

The Fund has alleged two sufficient alternative statutory bases for obtaining personal jurisdiction over the defendants. The remaining question that must be answered is whether the exercise of such jurisdiction would be constitutional. We begin by analyzing the state long-arm statute and determining if Illinois could exercise personal jurisdiction over REE and REWCOR.

In order for personal jurisdiction to be proper a defendant must have purposefully established minimum contacts with the forum. *See Burger King Corp. v. Rubzewicz*, 471 U.S. 462, 474-76 (1985); RAR, 107 F.3d at 1277. The generalized foreseeability of the defendant's action causing harm in the forum is not sufficient for the exercise of jurisdiction. Burger King, 471 U.S. at 474. Instead, whether the conduct and connection with the forum are such that it should reasonably anticipate being hailed into court there is the crucial inquiry. Id.; RAR 107 F.3d at 1277. To establish such a reasonable

anticipation the defendant must have purposefully availed itself of the privilege of conducting activities in the forum, invoking the benefits and protections of its laws. Burger King, 471 U.S. at 474-75; RAR, 107 F.3d at 1277. Once minimum contacts have been shown to exist, a court must examine other factors, such as the forum's interest In adjudicating the dispute and the burden on the defendant, to determine whether the exercise of personal jurisdiction satisfies traditional notions of fair play and substantial justice. Burger king, 473. U.S. at 476-77. In certain limited circumstances, these factors may show that a forum has such a strong interest in adjudicating a dispute that a lesser showing of minimum contacts than is normally the case may suffice for jurisdiction *Id.* at 477. To exercise specific personal jurisdiction, the plaintiff's cause of action must arise out of or be related to these minimum contacts that sufficiently comport with fairness and justice. *See Helicopteros*, 466 U.S. at 414 & n.8; RAR 107 F.3d at 1277.

a) Corporate affiliation.

The Fund acknowledges the general rule that corporate ownership alone is not sufficient for personal jurisdiction. Nevertheless, the Fund claims that this principle does not apply in the context of withdrawal liability under MPPAA because 29 U.S.C. sec. 130(b)(1) states that all businesses under common control shall be treated as a single entity. The Fund argues that because this provision has been in effect since 1980, REE and REWCOR should have reasonably anticipated being subject to MPPAA liability in Illinois and the united States. The Fund concludes that because a district court in Illinois was able to assert personal jurisdiction over ICTL, Illinois can exercise such jurisdiction over the defendants.

While we have not squarely considered this issue before, we hold that constitutional due process requires that personal jurisdiction cannot be premised on corporate affiliation or

stock ownership alone where corporate formalities are substantially observed and the parent does not exercise an unusually high degree of control over the subsidiary. Though we are mindful of the Supreme Court's admonition that "mechanical" tests generally should not be relied upon in determining when personal jurisdiction is constitutional, Burger King, 471 U. S. at 478, the court itself has suggested this rule see *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984) ("[N]or does jurisdiction over a parent corporation automatically establish jurisdiction over a wholly owned subsidiary."). We join other courts in finding that stock ownership in or affiliation with a corporation, without more, is not a sufficient minimum contact. *See* e.g. *Dean v. Motel 6 Operating L.P.*, 134 P.3d 1269, 1173-74 (6th cir. 1998); *Miller v. Honda Motor Co.*, 779 F2d 769, 771-72 (1st Cir 1985); *Transure, Inc. v. Marsh and McLennan, Inc.* 766 F.2d 1297, 1299 (9th Cir. 1985); *see also Shaffer v. Heitner*, 433 U.S. 186, 216 (1977) (holding that ownership of shares in a corporation located in a particular forum is not purposeful availment of that forum); *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 336-31 (1925) (holding, though not on constitutional grounds, that jurisdiction over a subsidiary does not provide for jurisdiction over the parent where the two are separate entities).

A couple of reasons support this holding. First, where corporate formalities are substantially observed and the parent does not dominate the subsidiary, a parent and a subsidiary are two separate entities and the acts of one cannot be attributed to the other. The Supreme Court, in a discussion of whether jurisdiction over the subsidiary can be leveraged into jurisdiction over the parent, has stated that "[e]ach defendant's contacts with the forum State must be assessed individually." Keeton, 465 U.S. at 781 n.13. The unilateral activity of an entity' cannot subject's a nonresident defendant to personal jurisdiction in the entity's forum. See *Burger King*, 471 U.S. at 474-75 (quoting *Hanson v. Denckla*, 357

U.S. 235, 253 (1958)). Where two corporations are in fact separate, permitting the activities of the subsidiary to be used as a basis for personal jurisdiction over the parent violates this principle and thus due process. Second, the primary purpose of the corporate form is to prevent a company's owners, whether they are persons or other corporations, from being liable for the activities of the company. Where corporate formalities have been observed, a company's owners reasonably expect that they cannot be held liable for the faults of the company. Thus such owners do not reasonably anticipate being hailed into a foreign Forum to defend against liability for the errors of the corporation.

The Fund's argument that this analysis changes where a federal statute premises liability on corporate affiliation ignores the process by which courts determine whether specific personal jurisdiction exists and confuses liability and Jurisdiction. To decide whether specific personal jurisdiction may be exercised, a court must engage in three distinct steps in the following order: (1) identify the contacts the defendant has with the forum; (2) analyze whether these contacts meet constitutional minimums and whether exercising jurisdiction on the basis of these minimum contacts sufficiently comports with fairness and justice; (3) determine whether the sufficient minimum contacts, if any, arise out of or are related to the causes of action involved in the suit. If the court determines at the second step that a defendant does not have sufficient minimum contacts with the forum, then its personal jurisdiction analysis ends without examining the plaintiff's causes of action, The laws on which the suit are based would be irrelevant because a state or federal statute cannot transmogrify insufficient minimum contacts into a basis for personal jurisdiction by making these contacts elements of a cause of action, since this would violate due process. *See AT & T Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 59041 (9th Cir. 1996). Similarly, jurisdiction and liability are two separate inquiries. *See Id. Carty v. Beech Aircraft Corp.*,

679 F.1051, 1061 (1st Cir. 1982); *Witt v. Scully*, 539 F2d 950, 951-52 (3d Cir. 1976). The fact that a defendant would be liable under a statute if personal jurisdiction over it could be obtained is irrelevant to the question of whether such jurisdiction can be exercised. MPPAA's definition of corporate affiliation as an element of withdrawal liability cannot confer personal jurisdiction on the basis of such affiliation any more than a California cause of action's inclusion of a defective product as an element of liability can confer jurisdiction over a Japanese manufacturer whose defective product causes injury in California but who does not have sufficient minimum contacts with that state. *See Asahi Metal Indus. v Superior Court of California Solano County*, 480 U.S. 102, 105-06, 112-13 (1987) (opinion of O'Connor, J.). In many circumstances the conduct of a foreign defendant may satisfy the elements of liability contained in a statute, but this defendant will escape judgment because personal jurisdiction is lacking. Thus MPPAA's control group provision regarding withdrawal liability does not alter the rule that corporate affiliation or ownership is not a sufficient minimum contact for the exercise of personal jurisdiction.[8]

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[8] Our decision on this issue is consistent with the Ninth Circuit's analogous determination in AT&T, 94 F3d 586. In that case, the plaintiffs argued that a parent corporation was an "operator" of a subsidiary that had incurred CERCLA liability because of its stock ownership and control of the subsidiary. *Id.* at 588. (AT&T predated the decision In *United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998) which held that CERCLA liability cannot be imposed on a parent because of its ownership of a polluting subsidiary unless the corporate veil can be pierced.) Because the parent corporation would be liable due to the affiliation, the court could exercise personal Jurisdiction over the parent. The Ninth circuit rejected this argument and held that even if the defendants would be liable under CERLA, the defendant' ownership of the subsidiary alone was not sufficient for personal jurisdiction and congress could not alter this. 94 F.3d at 590-91.

Applying our above holding to this case, corporate affiliation cannot serve as a basis for personal jurisdiction over REE or REWCOR. ICTL conducted business as a corporate entity distinct from REE and REWCOR. ICTL maintained separate books, records financial statements, and tax returns, as well as observing all corporate formalities. Neither REE nor REWCOR exercised day-to-day management control over ICTL. The Fund does not claim that REE or REWCOR were mere alter egos of ICTL, or that the two defendants exercised an abnormal degree of control over ICTL. The Fund does claim that a fax cover page's indication that it was sent by "REE/ICTL" suggests an erosion of corporate distinctions. However, a more obvious interpretation is that REE was sending the fax on behalf of ICTL, whose jurisdictional significance is discussed below. In any case, a mere fax legend is insufficient to show either that corporate formalities were not substantially observed or that REE controlled ICTL to an unusually high degree. Thus, the facts of this case do not demonstrate that REE or REWCOR can be subjected to personal jurisdiction on the basis of their affiliation with ICTL.

At this point in our analysis, we affirm the dismissal of defendant REWCOR. The only contact REWCOR has with either Illinois or the United States was affiliation with ICTL. REWOR was not a parent of ICTL and apparently did not exercise any control whatsoever over ICTL, much less the domination necessary for us to find personal jurisdiction over a parent based on the actions of the subsidiary. Thus, regardless of whether the Illinois long-arm statute or Fed. R.Civ.P. 4(k) (2) provides the statutory basis for jurisdiction, REWCOR lacks sufficient minimum contacts with either forum.

b) Other contacts.

The Fund claims that REE has other contacts with Illinois and the United States that are sufficient for the exercise of

jurisdiction. These contacts include the correspondence the Fund received with REE's letterhead on the fax cover pages and the fringe benefit agreement that was signed by an REE employee.

We adopt the rule that a corporate parent may provide administrative services for its subsidiary in the ordinary course of business without calling into question the separateness of the two entities for purposes of personal jurisdiction. *See, e.g. Dunn v. A/S Em. Z. Svitzer*, 885 F. Supp. 980, 988-89 (S.D. Tex. 1995); *Calvert v. Huckins*, 875 F. supp. 674, 678. 79 (E. D. Cal. 1995). The basis for this proposition is much the same as for the more general principle that jurisdiction over a parent cannot be based merely on jurisdiction over a subsidiary. Parent corporations regularly provide certain services to their subsidiaries. Such parents do not expect that performing these activities may subject them to liability because of the actions of the subsidiaries. Thus, such standard services are not sufficient minimum contacts to support the exercise of jurisdiction.

The fringe benefit agreement extended ICTL's obligation to contribute to the Fund. This contract did not impose any obligation on or otherwise involve REE. Cockburn, an employee of REE, did sign the agreement. However, the uncontroverted affidavit of Cockburn explains that he serves as a consultant to REE's subsidiaries and the subsidiaries pay REE for his services.[9] He states that he signed the fringe benefit agreement on behalf of ICTL at the direction of Hugh Richardson, who was the president of ICTL. When the parent receives compensation for the subsidiary's use of the services

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[9] The Fund forfeited any objection to the introduction of Cockburn's affidavit, which was submitted with the defendants' reply memorandum to the motion for dismissal, by failing to raise it during the five-and-half month period after the motion was fully briefed and before the district court ruled. *See Dugan v. Smerick Sewerage Co.*, 142 F.3d 398, 406 (7th Cir 1998).

of an employee of the parent, the employee acts on behalf of the subsidiary and not the parent, and the employee acts at the direction of the subsidiary's *officers*, the parent, at most, provides standard administrative services to the subsidiary. Thus, the fringe benefit agreement is not a sufficient minimum contact with either forum.

The other contacts alleged by the Fund fail for similar reasons. Messel was an employee of REE, but provided payroll services for ITCL at the direction of ICTL, who paid REE for her services. Her use of REE letterhead when she sent faxes to the Fund does not change the fact that she provided standard administrative services. Similarly, ICTL asking the Fund to change its billing address to Winnipeg, Manitoba shows, at most, that REE was providing payroll services. None of these activities constitute a sufficient minimum contact. Thus, we conclude that Illinois could not constitutionally exercise jurisdiction on the basis of these administrative services that REE provided to ICTL.

As discussed above if Illinois could not exert personal jurisdiction the Fund could take advantage of Fed. R. Civ. P. 4(k)(2) under which we analyze all of REE's contacts with the United States.[10] However, the Fund has not brought to our attention any contacts that REE itself had with the United states other than those with Illinois. Whatever business ITCL may have done throughout the United States is irrelevant since this cannot be a basis for jurisdiction over ICTL's parent REE, a separate corporate entity. Therefore, Fed. R.Civ.P. 4(k)(2) does not aid the Fund. None of the contacts alleged by the Fund would permit either Illinois or the United States to exercise specific personal jurisdiction over REE consistent with due process.

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[10] Where a federal statutory basis for jurisdiction exists, then we analyze whether the defendant has sufficient minimum contacts with the United States as a whole to determine whether personal jurisdiction is constitutional under the Due Process clause of the Fifth Amendment. *See* Elite Erectors, 212 F.3d at 1035-36.

B. Discovery

The Fund claims that the district court should have permitted discovery concerning whether personal jurisdiction over REE and REWCOR would be proper. At a minimum, the plaintiff must establish a colorable or prima facie showing of personal jurisdiction before discovery should be permitted. *See Ellis v. Fortune Seas, Ltd.*, 175 F.R.D. 308, 312 (S.D. Ind. 1997). Foreign nationals usually should not be subjected to extensive discovery in order to determine whether personal jurisdiction over them exists. *See Jazini v. Nissan Motor co.*, 148 F.3d 181. 185-86 (2d Cir. 1998). We review the district court's denial of discovery on this issue for abuse of discretion. *See Caribbean Broad. Sys. Ltd. v. Cable & Wireless P.L.C.*, 148 F.3d 1080, 1089 (D.C. Cir. 1998); *Noonan v. Winston Co.*, 135 F.3d 85, 94 (1st Cir. 1998).

We conclude that the district court did not abuse its discretion in denying the Fund's request for discovery into whether REE and REWCOR are subject to the personal jurisdiction of the court. Almost all of the Fund's evidence showed only that REE and REWCOR were affiliated with ICTL, without any showing that the defendants exercised an unusually high degree of control over ICTL or that corporate formalities were not substantial observed, or that REE provided standard administrative services to ICTL. None of this is sufficient to show a colorable basis for jurisdiction. Further, even if the fax cover legend naming "REE/ICTL" as the sender suggested a lack of corporate formalities sufficient to support a colorable showing of personal jurisdiction, granting the Fund's broad interrogatories and document requests would have been inappropriate for two reasons, both noted by the district court. First, most of these requests were irrelevant to the issue of specific personal jurisdiction. For example, such demands as that REE and REWCOR produce all documents sent to any United States federal or state agency from 1986 to 1993, produce all documents sent to any United States based entity, and identify all of their

shareholders in the United States, even if they might aid in establishing that the defendants had minimum contacts with the United States, would not establish any contacts arising out of or relating to the defendants' responsibility under MPPAA for ICTL's withdrawal liability. Second, imposing such burdensome, wide-ranging discovery against defendants from a foreign nation is not appropriate at a stage where the district court is trying to determine whether it has any power over the defendants. While perhaps the district court might have decided to permit more narrowly targeted discovery against REE and REWCOR, we do not find that its refusal to do so constitutes an abuse of discretion.

III. Conclusion

Corporate affiliation with and the provision of standard administrative services to ICTL are not sufficient minimum contacts to exercise specific personal jurisdiction over REE arid REWCOR. The trial judge did not abuse his discretion in denying the Fund's discovery requests because of the burden these would have imposed on the foreign defendants and, in many cases their irrelevance to the specific personal jurisdiction issue. Therefore, the judgment of the district court is Affirmed.

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No. ____

IN THE
Supreme Court of the United States

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, AND HOWARD MCDOUGALL, ONE OF ITS TRUSTEES,
Petitioners,

v.

REIMER EXPRESS WORLD CORPORATION, A CANADIAN CORPORATION, AND REIMER EXPRESS ENTERPRISES LIMITED, A CANADIAN CORPORATION,
Respondents.

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOP A WRIT OF CERTIORARI

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UNITED STATES DISTRICT COURT,
N.D. ILLINOIS, EASTERN DIVISION

No. 99 C 2524.

CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, AND HOWARD MCDOUGALL, TRUSTEE,
Plaintiffs,

v.

REIMER EXPRESS WORLD CORP., A CANADIAN CORPORATION, AND REIMER EXPRESS ENTERPRISES, LTD., A CANADIAN CORPORATION,
Defendants.

Jan. 31, 2000

MEMORANDUM AND ORDER

MORAN, Senior J.

Plaintiffs bring this action under the Employee Retirement Income Security Act of 1974 (ERISA) claiming that defendants are responsible for money owed to a pension fund by defendants' corporate affiliate. Defendants have moved to dismiss the complaint on a variety of grounds. For the reasons stated below, we grant defendants' motion to dismiss.

BACKGROUND

In April 1988, Inter-City Truck Lines, Inc. (Inter-City or ICTL) began contributing to the Central States, Southeast and Southwest Areas Pension Fund (the Fund) on behalf of Inter-City employees. The Fund is a trust organized under Illinois

law with its principal place of business in Illinois. We shall refer to the Fund and its trustee Howard McDougall collectively as plaintiffs. Before it went out of business in 1993, Inter-City was a Canadian trucking company which operated in Detroit, Michigan, but had its principal place of business in Canada. Inter-City was owned by defendant Reimer Express Enterprises, Ltd. (REE), also a Canadian corporation, with its principal place of business in Canada. REE also owns defendant Reimer Express World Corp. (REWCOR), a Canadian corporation formed on November 29, 1993. We shall refer to REE and REWCOR collectively as defendants.

In May 1993, Inter-City went out of business and ceased to have an obligation to contribute to the Fund. This effected a "withdrawal" under ERISA, as amended by the Multi-employer Pension Plan Amendment Acts of 1980, 29 U.S.C. § 1383. In order to protect pension plan participants, ERISA requires employers withdrawing from a pension plan to pay their share of the plan's unfunded vested benefits, *i.e.*, the shortfall between the present value of the fund's assets and the present value of the vested pension benefits the plan will be obligated to pay out in the future. The statute refers to this amount as the employer's "withdrawal liability." 29 U.S.C. §§ 1381, 1391. The Fund assessed Inter-City's withdrawal liability to be $310,922.12. Relying on the "control group" provisions of ERISA, 29 U.S.C. § 1301(b)(1), which make businesses under common control jointly and severally liable for any affiliate's withdrawal liability, the Fund also determined that defendants were responsible for Inter-City's withdrawal liability. On June 23, 1994, defendants received notice from the Fund demanding payment in the amount of Inter-City's withdrawal liability plus interest. Defendants requested a review of the Fund's determination, which the Fund rejected on November 1, 1994.

Plaintiffs thereafter filed this action claiming that defendants are responsible for the withdrawal liability owed by Inter-City. Defendants have moved to dismiss the complaint for lack of personal jurisdiction, lack of subject matter jurisdiction, and failure to state a claim. Because we dismiss the complaint for lack of personal jurisdiction, we do not address defendants' other grounds for dismissal.

DISCUSSION

On a motion to dismiss plaintiffs bear the burden of demonstrating the existence of personal jurisdiction. *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1276 (7th Cir.1997). In order to do so, plaintiffs must show either that defendants' contacts with Illinois were sufficient to confer jurisdiction under Illinois' long arm statute, or, alternatively, that defendants' contacts with the United States as a whole are sufficient to establish personal jurisdiction as a matter of federal law.[1] Plaintiffs fail on both accounts.

I. Illinois Contacts

A federal court has personal jurisdiction if a court in the state in which it sits would have such jurisdiction. *See* Fed.R.Civ.P. 4(k)(1)(A). In this case, we look to Illinois' long arm statute to determine whether we have personal jurisdiction over defendants. *See* 735 ILCS 5/209. The Illinois statute, in turn, provides that a court may exercise personal jurisdiction on any basis permitted by the Illinois

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[1] As discussed in part II below, this second alternative is available in this case because defendants are foreign corporations. *See* Fed.R.Civ.P. 4(k)(2). Defendants' status as foreign corporations also makes Rule 4(k)(1)(d) inapplicable in this case. That rule states that service of summons is effective to establish jurisdiction when authorized by federal statute. Fed.R.Civ.P. 4(k)(1)(d). However, ERISA—the federal statute at issue here--limits "extraterritorial service to a nationwide, not worldwide, scope." *United Electrical, Radio and Machine Workers of America v. 163 Pleasant Street Corp.*, 960 F.2d 1080, 1086 (1st Cir.1992).

constitution and the Constitution of the United States. 735 ILCS 5/209(c); RAR, 107 F.3d at 1276. Under the Illinois constitution's due process clause, personal jurisdiction "is to be asserted only when it is fair, just, and reasonable to require a nonresident defendant to defend an action in Illinois, considering the quality and nature of the defendant's acts which occur in Illinois or which affect interests located in Illinois." *Rollins v. Ellwood*, 565 N.E.2d 1302, 1316 (Ill.1990). Unfortunately, the Illinois courts have provided little guidance as to how Illinois due process differs from federal due process. *See* RAR, 107 F.3d at 1276; *Jamik, Inc. v. Days Inn of Mount Laurel*, 1999 WL 1092008, at *2 (N.D.Ill. Nov. 30, 1999). Therefore, we will focus our inquiry on the federal constitutional requirements for personal jurisdiction.

Plaintiffs argue that personal jurisdiction over defendants is constitutionally permissible because the claims underlying this lawsuit arise out of defendants' specific contacts with Illinois. *See* 735 ILCS 5/209(f); *NUCOR Corp. v. Aceros Y Maquilas de Occidente, S.A. de C.V.*, 28 F.3d 572, 580 (7th Cir.1994). Plaintiffs' argument invokes the concept of specific jurisdiction. The Seventh Circuit recently elucidated the constitutional standards governing such cases:

> In specific jurisdiction cases, we must decide whether a defendant has "purposefully established minimum contacts within the forum State" and consider whether, by traditional standards, those contacts would make personal jurisdiction reasonable and fair under the circumstances. Crucial to the minimum contacts analysis is showing that the defendant "should reasonably anticipate being haled into court [in the forum State]," because the defendant has "purposefully avail[ed] itself of the privilege of conducting activities" there.

RAR, 107 F.3d 1277 (citations omitted). The Seventh Circuit also admonished that specific jurisdiction requires that

the lawsuit "arise out of" or "be related to" a defendant's minimum contacts with the forum state. *Id.* "We cannot simply aggregate all of a defendant's contacts with a state—no matter how dissimilar in terms of geography, time or substance—as evidence of the constitutionally-required minimum contacts." *Id.*

With these standards in mind we examine defendants' specific contacts in Illinois to determine whether this lawsuit arises out of those contacts in a manner sufficient to warrant exercising personal jurisdiction over defendants in this case. Plaintiffs point to a handful of contacts between REE and Illinois in support of their position. For example, plaintiffs argue that REE's acquisition of Inter-City, a company that conducted business in Illinois and participated in the Fund, is a contact sufficient to confer personal jurisdiction. Plaintiffs over-reach when they assert that the harm alleged in their complaint, failure to pay withdrawal liability, arose out of REE's acquisition of Inter-City. Under plaintiffs' theory, any alleged misconduct by Inter-City would subject REE to personal jurisdiction wherever Inter-City conducted business simply by virtue of REE's status as Inter-City's acquirer. Such a broad and unprecedented application of specific jurisdiction would be antithetical to the nature of the rule.[2] Furthermore, although plaintiffs state that the locus of the acquisition was in Illinois, the acquisition of Inter-City by REE has its more logical locus in Canada. Both REE and Inter-City are Canadian corporations and the acquisition of the latter by the former does not subject REE to specific jurisdiction in Illinois.

Plaintiffs also argue that certain communications between REE personnel and the Fund supply the necessary Illinois

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[2] As discussed more fully below, a parent-subsidiary relationship generally is insufficient to establish personal jurisdiction over the parent. *See Androphy v. Smith & Nephew, Inc.*, 31 F.Supp.2d 620, 622 (N.D.Ill.1998).

contacts. Chiefly, plaintiffs rely on a Fringe Benefit Agreement between Inter-City and the Fund which was executed by J.D. Cockburn, an REE official. Plaintiffs argue that Cockburn was an agent of REE and his execution of the Fringe Benefit Agreement gave rise to plaintiffs' claim, justifying specific jurisdiction over REE. It is apparent from the face of the Fringe Benefit Agreement, however, that Cockburn signed the contract on behalf of Inter-City and that the contract bound only Inter-City, not REE.[3] The agreement identifies Inter-City and the Fund as the two contracting parties and REE is neither mentioned or referred to in the document. Moreover, plaintiffs are not suing to enforce the Fringe Benefit Agreement in this lawsuit. Rather, plaintiffs' complaint seeks withdrawal liability based on the cessation of Inter-City's contributions to the Fund. This claim does not arise out of the Fringe Benefit Agreement, and therefore that contact cannot form the basis for specific jurisdiction over REE in this case.

Secondarily, plaintiffs point out that on two occasions Inter-City documents were forwarded to the Fund with fax cover pages bearing REE letterhead. Plaintiffs argue that these communications were sufficient to confer personal jurisdiction over REE in Illinois. We are unpersuaded. As a preliminary matter we observe that plaintiffs base their argument on the thin reed of two fax cover sheets bearing REE letterhead. The documents faxed along with these cover sheets were the Fringe Benefit Agreement and payroll documents. Both of these sets of documents related only to Inter-City, and the persons sending these documents to the Fund were acting on behalf of Inter-City. Indeed, the cover sheet sent along with the payroll documents plainly states that the person faxing the materials is from "ICTL (Payroll)."

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3 According to Cockburn's affidavit, Inter-City president Hugh Richardson authorized Cockburn to sign the Fringe Benefit Agreement on behalf of Inter-City.

That the fax cover sheets were preprinted with REE letterhead holds little relevance. Even if the persons sending the faxes were acting on behalf of REE and not Inter-City, personal jurisdiction over REE would not be warranted. A corporate parent, especially one that is a holding company like REE, may provide administrative services for its subsidiary without undermining corporate separateness and triggering personal jurisdiction over the parent. *See RAE Prod. and Chem Corp. v. Elf Aquitaine, Inc.*, 1994 WL 282279, at *3 (N.D. Ill. June 22, 1994); *Integrated Bus. Info. Serv. v. Dun & Bradstreet*, 714 F.Supp. 296, 299-300 (N.D.Ill.1989); *see also Calvert v. Huckins*, 875 F.Supp. 674, 679 (E.D.Cal.1995). In any event, this lawsuit does not arise out of the fax cover sheets, and those two pages are an insufficient basis upon which to exercise personal jurisdiction over REE.

The Illinois contacts plaintiffs rely on are sparse and tenuous. Even if the contacts may be ascribed to REE and not Inter-City, they did not give rise to the allegations in plaintiffs' complaint. Therefore, specific jurisdiction over REE does not exist.

II. National Contacts

The personal jurisdiction inquiry does not end in this case with our finding that defendants' Illinois contacts are insufficient. Under Rule 4(k)(2), service of process may be sufficient to confer personal jurisdiction in this case because defendants are foreign corporations. Fed.R.Civ.P. 4(k)(2). As amended in 1993, Rule 4(k)(2) provides:

> If the exercise of jurisdiction is consistent with the Constitution and the laws of the United States, serving a summons . . ., is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

According to the Advisory Committee Notes, Rule 4(k)(2) was enacted to fill a specific gap in the federal law presented when a foreign defendant may have significant aggregate contacts with the United States, but insufficient contact with any single state to support jurisdiction under state long-arm statutes. The rule first requires a court to determine whether the case arises under federal law and whether the foreign defendant lacks sufficient contact with any single state to subject it to personal jurisdiction there. If so, the court must then "scrutinize plaintiff's allegations to ascertain whether plaintiff has demonstrated that defendant has sufficient aggregate contacts with the United States to comport with constitutional notions of due process." *U.S. v. International Broth. of Teamsters*, 945 F.Supp. 609, 617 (S.D.N.Y.1996); *see Pyrenee, Ltd. v. Wocom Commodities, Ltd.*, 984 F.Supp. 1148, 1159 (N.D.Ill.1997).

With respect to the preliminary conditions, plaintiffs bring this cause of action under ERISA and therefore it arises under federal law. As discussed above, defendants' contacts with Illinois are insufficient to subject them to specific personal jurisdiction there and, for the purposes of this motion, we will assume that defendants' contacts similarly are insufficient to subject them to jurisdiction in any single state. Therefore, we are left to examine defendants' aggregate national contacts in order to determine whether the due process clause of the Fifth Amendment permits us to exercise personal jurisdiction under Rule 4(k)(2). *See Pyrenee*, 984 F.Supp. at 1159.

Plaintiffs argue that defendants' corporate affiliation with Inter-City, a company which conducted extensive business in the United States, provides the aggregate national contacts necessary for exercising personal jurisdiction. This argument is flawed. The activities of Inter-City cannot be attributed to defendants. As plaintiffs concede, in general "the parent-subsidiary relationship is insufficient to confer personal jurisdiction." *Androphy v. Smith & Nephew, Inc.*, 31 F.Supp.2d 620, 622 (N.D.Ill.1998). Courts in this circuit

repeatedly have emphasized "that '[p]arents of wholly owned subsidiaries necessarily control, direct and supervise the subsidiaries to some extent' but anything less than the degree of control necessary to pierce the parent corporation's veil of liability is insufficient to establish personal jurisdiction over the parent." *Insolia v. Philip Morris, Inc.*, 31 F.Supp.2d 660, 669 (W.D.Wis.1998) (*quoting IDS Life Ins. Co. v. SunAmerica Life Ins. Co.*, 136 F.3d 537, 540 (7th Cir.1998)); Integrated Bus., 714 F.Supp. at 299-300. Where the parent corporation is a holding company, as defendants are in this case, it is even more difficult to establish the degree of control required to exercise personal jurisdiction over the parent. *See* RAE, 1994 WL 282279, at *3.

Plaintiffs have presented no allegations establishing that defendants were the alter ego of Inter-City, or that defendants exercised the degree of control over Inter-City necessary to pierce the corporate veil. Plaintiffs do not allege that defendants exerted substantial control over Inter-City's day-to-day activities. *See Androphy*, 31 F.Supp.2d at 622; RAE, 1994 WL 282279, at *3. Inter-City's conduct cannot be imputed to REE simply by virtue of the latter's ownership of the former. More is needed to establish personal jurisdiction over a parent for the conduct of its subsidiary. The allegations in the complaint fall short.

Inter-City's national contacts are not attributable to defendants for the purposes of assessing personal jurisdiction. Defendants' own national contacts, as alleged in the complaint, are no more than the Illinois contacts discussed and found lacking above. Having failed to allege sufficient contacts for us to exercise personal jurisdiction over defendants in a manner consistent with the Constitution, plaintiffs' complaint must be dismissed.[4]

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[4] Plaintiffs' request for discovery into the personal jurisdiction issue must also be denied. The contacts asserted by plaintiffs as jurisdiction-

CONCLUSION

For the reasons stated above, defendants' motion to dismiss is granted.

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that the defendants' motion to dismiss is granted.

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conferring are doubly flawed—they are attributable to Inter-City and not to defendants, and they do not give rise to the harms alleged in the complaint. Discovery is inappropriate when a plaintiff has not offered a colorable basis for jurisdiction, particularly when discovery is sought against a foreign corporation for the alleged conduct of its subsidiary. *See Jazini v. Nissan Motor Co., Ltd.*, 148 F.3d 181, 185-86 (2d Cir.1998); *Ellis v. Fortune Seas, Ltd.*, 175 F.R.D. 308, 311-12 (S.D.Ind.1997); We see no reason to subject the foreign defendants to the discovery process in this case.